

6 Official Opinions of the Compliance Board 17 (2008)

PUBLIC BODY – “MANAGEMENT COMMITTEE” OF BALTIMORE METROPOLITAN COUNCIL, HELD NOT TO BE A PUBLIC BODY

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The Open Meetings Compliance Board has considered your complaint that the Baltimore Regional Transportation Board (“BRTB”) violated the Open Meetings Act in connection with two “work sessions” held on September 5 and October 9, 2007. The complaint also suggested that certain conference calls apparently violated the Act.

For the reasons explained below, we find no violation with respect to the meetings held September 5 and October 9, 2007, because the Open Meetings Act did not apply to them. We are unable to reach a conclusion whether the phone calls mentioned in the complaint and briefly addressed in the response may have triggered the notice requirements of the Act.

I

Complaint and Response

The complaint recited the fact that the BRTB was established under State law as the transportation planning organization in the Baltimore region. Thus, the complaint asserted, the BRTB is a “public body” for purposes of the Open Meetings Act. § 10-502(h)(1).¹

The complaint alleged a number of violations of the Act in connection with a transportation planning process referred to as Transportation Outlook 2035. Specifically, the complaint alleged that in conducting work sessions on September 5 and October 9, 2007, the BRTB violated the requirement that, except as expressly authorized under the Act, a public body must meet in open session. § 10-505. The

¹ Excepted as otherwise noted, all statutory references are to the Open Meetings Act, Title 10, Subtitle 5 of the State Government Article, Annotated Code of Maryland.

complaint also suggested that we determine whether certain phone calls were conference calls improperly conducted in violation of the Act. In support of these allegations, the complaint included e-mail communications from the executive director of the Baltimore Metropolitan Council as well as a draft copy of minutes of the BRTB's October 23, 2007, meeting. The minutes reflected that, in response to a comment by Ms. Poulsen, the chair of the BRTB responded that "several work sessions and many phone calls were undertaken to arrive at consensus on the [Transportation Outlook 2035] revisions."

The complaint further alleged violations of § 10-506, requiring that a public body give notice in advance of a meeting governed by the Act. In support of this allegation, the complaint cited a document captioned "Summary of public comments and BRTB Response, Transportation Outlook 2035, Revised Draft Plan." In response to a comment that "[t]he revised plan was developed behind closed doors, in violation of the Maryland Open Meetings Act and the Board's own Bylaws," the document indicated that "[i]nformal BRTB work sessions were held to consider revisions to *Outlook 2035*. Given the nature of the discussions and the absence of all BRTB members, the BRTB did not believe it was in violation of Maryland's Open meeting [*sic*] Act...." The complaint noted that apparently no notice was provided of these work sessions. While acknowledging that the complainants are unaware whether a quorum was present at the work sessions on September 5 and October 9, the complaint noted that notice of the meetings was nonetheless required.

The complaint further alleged that these two work sessions involved a legislative function as defined by the Act and could not have been closed under the exceptions enumerated in § 10-508(a). Nor were the procedural requirements for closing a meeting under § 10-508 apparently followed. Finally, the complaint alleged that the BRTB apparently failed to prepare minutes of either session as required under § 10-509. In summary, the complainants noted that they "consider the violations ... to be serious in that they exclude[d] members of the public, not to mention members of BRTB's own Citizen Advisory Committee ... from deliberations about suggested revisions to the Transportation Outlook 2035 document."

In a timely response on behalf of the BRTB, Elena DiPietro, Assistant Baltimore City Solicitor, reviewed the creation of the BRTB.² According to the response, the Baltimore Metropolitan Council established the BRTB as part of its bylaws, adopted pursuant to Article 78, § 5(a)(3), Annotated Code of Maryland. The response addressed the composition and role of the BRTB, including the development of a long-range transportation plan for the Baltimore region. Elected officials representing the region's local governments generally attend a single

² In response to a request from the City Law Department, the Compliance Board granted a brief extension of time for the filing of a response.

meeting a year. At most meetings of the BRTB, the elected officials are represented by their “empowered representatives.”

However, according to the response, the Executive Director of the Baltimore Metropolitan Council has created an informal group, distinct from the BRTB, known as the “Management Committee,” with which he consults on various policy matters. The Management Committee consists of high-level representatives of local governments that are members of the Baltimore Metropolitan Council, but the Management Committee does not include members of the BRTB or their empowered representatives.

The meetings referred to in the complaint, the response went on, were not meetings of the BRTB, but rather meetings of the Management Committee. “When the empowered representatives of the BRTB were asked to prepare the lists of transportation projects for possible cuts in funding, it was necessary to ensure that they had the input of their elected officials In order to facilitate communication between the empowered representatives and the elected officials, the Executive Director of the [Baltimore Metropolitan Council] enlisted the help of the Management Committee.” The Management Committee met on three occasions, during which committee members discussed the lists and whether the elected officials were in agreement. Empowered representatives who attended those meetings were there in their capacity as subordinates to members of the Management Committee.

According to the response, because the Management Committee is an entity informally created by the Executive Director of the Baltimore Metropolitan Council, it is not a “public body” subject to the Open Meetings Act. § 10-502(h). Thus, the requirements referred to in the complaint did not apply to the meetings at issue. Relying on 1 *OMCB Opinions* 183 (1996), the response argued that, although “empowered representatives” of the BRTB were also present, that fact alone did not convert the sessions into meetings of the BRTB, inasmuch as they attended in their capacities as staff to members of the Management Committee and did not function as the BRTB. Thus, according to the response, no violation of the Open Meetings Act occurred. Regarding the telephone calls referenced in the complaint, the response noted that there is no indication that a quorum of BRTB members participated.

II

Analysis

A. *Management Committee*

We use a three-part analysis to determine whether the Open Meetings Act applies: (1) Is the entity a “public body” subject to the Act? (2) If so, did the particular session constitute a “meeting” for purposes of the Act? (3) And finally, was the topic of discussion subject to the Act? 5 *OMCB Opinions* 194, 196 (2007). There is no dispute that the BRTB itself is a public body. Yet if, as the response contended, the sessions on September 5 and October 9 were meetings of the Management Committee rather than the BRTB, and the Management Committee is not a “public body” as defined by the Act, our analysis ends, because none of the provisions of the Act cited in the complaint would have applied. *Id.*

The Open Meetings Act defines a “public body,” in relevant part, as:

(1) ... an entity that:

(i) consists of at least 2 individuals; and

(ii) is created by:

1. the Maryland Constitution;
2. a State statute;
3. a county charter;
4. an ordinance;
5. a rule, resolution, or bylaw;
6. an executive order of the Governor; or
7. an executive order of the chief executive authority of a political subdivision of this State.

(2) “Public body” includes:

(i) any multimember board, commission, or committee appointed by the Governor or the chief executive authority of a political subdivision of the State, or appointed by an official who is subject to the policy direction of the Governor or chief executive authority of the political subdivision, if the entity includes in its membership at least two individuals not employed by the State or the political subdivision; ...

§ 10-502(h)(1) and (2)(i). Given the respondent's explanation that the Management Committee was informally created by the Executive Director of the Baltimore Metropolitan Council rather than by any of the formal instruments identified in § 10-502(h)(1), we conclude that it is not a "public body" under that provision. Furthermore, given that it includes only senior staff of the elected officials on the Council rather than representatives of the public, the Management Committee would not fall under the alternative definition of a "public body" in § 10-502(h)(2)(i). 5 *OMCB Opinions* at 198-199.

We also agree with the respondent's assertion that the attendance of "empowered representatives" who serve on the BRTB did not transform the Management Committee sessions into meetings of the BRTB if they attended solely in their capacity as subordinate staff of members of the Management Committee and did not engage in the business of the BRTB. This is true even if discussions involved matters such as the Transportation Outlook 2035 plan pending before the BRTB. See 1 *OMCB Opinions* 183, 185 (1996), citing *Ajamian v. Montgomery County*, 99 Md. App. 665, 639 A.2d 157, cert. denied, 334 Md. 631, 640 A.2d 132 (1994). As we then explained, "[i]f interaction among the members of the public body does not occur, and the ... group is not a mere subterfuge to evade the law, no violation occurs." 1 *OMCB Opinions* at 185. Given the respondent's description of the Management Committee sessions, and the lack of any contrary evidence, we decline to find that the Management Committee sessions were intended to circumvent the open meeting requirements applicable to the BRTB.

In summary, the Management Committee sessions on September 5 and October 9 were not subject to the Open Meetings Act.³

B. Conference Calls

Based on a draft copy of the minutes of a BRTB meeting held on October 23, 2007, the complaint suggested that conference calls may have occurred in violation of the Open Meetings Act. The response to this allegation was rather limited: "With regard to telephone calls, there is no indication that a quorum of BRTB members participated in the telephone conversations."

³ We have limited our discussion to the two meetings identified in the complaint, September 5 and October 7, 2007, which were also the only sessions specifically addressed in the response. However, we point out that, according to one BRTB document, "[i]nformal BRTB work sessions were held to consider revisions to *Outlook 2035*." See Summary of public comments and BRTB Response, Transportation Outlook 2035, Revised Draft Plan, p. 12 (response to comment 96). This excerpt suggests that these were not the two Management Committee sessions addressed in the complaint and response. However, given the limited record before us, we express no opinion whether these sessions violated the Open Meetings Act.

Given the limited record, we are unable to reach a conclusion whether these phone calls were subject to the public notice requirements of the Act. *See* § 10-502.5(f)(2) (Compliance Board opinion may state that the Board is unable to resolve a complaint). If there was never an intent that a call include a quorum of BRTB's membership, and a quorum did not in fact participate, the call would not have been subject to the Act. § 10-502(g). On the other hand, if a call was scheduled in a manner that a quorum might have been anticipated, even if a quorum in fact did not participate, the notice requirements of the Act would have applied. § 10-506; *Community and Labor United for Baltimore Charter Comm. (CLUB) v. Baltimore City Bd. of Elections*, 377 Md. 183, 195, 832 A.2d 804 (2003).

III

Conclusion

We find no violation in connection with the meetings held on September 5 and October 9, 2007, in that the sessions were meetings of the Management Committee rather than the BRTB. The former is not a public body governed by the Act. We are unable to reach an opinion whether phone calls mentioned in the complaint and briefly addressed in the response may have been subject to the notice requirements of the Act.

OPEN MEETINGS COMPLIANCE BOARD*

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* Chairperson Elizabeth L. Nilson did not participate in the preparation or issuance of this opinion.